Supreme Court, U.S.
F I L E D
DEC 4 1996

No. 96-694

In The

Supreme Court of the United States

October Term, 1996

BIC CORPORATION,

Petitioner,

vs.

ROBERT CARNEY and SHEILA CARNEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a district court's order remanding a case to state court is reviewable on appeal when the remand order is based on a lack of diversity and subject matter jurisdiction, which is a ground specified in 28 U.S.C. § 1447(c).

PARTIES TO THE PROCEEDINGS

Respondents adopt the list of parties to the proceedings contained in the Petition.

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Robert Carney and Sheila Carney, respondents, respectfully request that certiorari be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1a)* dismissing BIC Corporation's appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction is published at 88 F.3d 629 (8th Cir. 1996). The order of the United States District Court for the Eastern District of Missouri remanding this case to state court due to lack of diversity and subject matter jurisdiction is unreported.

STATEMENT OF JURISDICTION

Although the jurisdiction of this Court is being invoked under 28 U.S.C. § 1254, the Considerations Governing Review on Certiorari specified in Rule 10 of the Rules of the Supreme Court of the United States are absent and the decision of the Eighth Circuit Court of Appeals is not in conflict with the decision of any other United States Court of Appeals.

STATUTORY PROVISIONS INVOLVED

The federal diversity jurisdiction statute provides in part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000.00, exclusive of interest and costs, and is between-

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* All references herein to "App." refer to the appendix filed by the Petitioner.

(1) citizens of different states

28 U.S.C. § 1332(a)(1).

The federal statute governing actions removable provides in part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(a).

The federal statute governing procedure after removal provides in part:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c)

The federal statute governing procedure after removal also provides:

> (d) An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to § 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).

The Missouri statute providing for interlocutory dismissal of a retailer whose liability is based solely on his status as a seller in the stream of commerce provides, in part:

> **Motion to dismiss, defendant whose liability is as seller in stream of commerce requirements, procedure — order of dismissal to be interlocutory**
>
> 1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.
>
> 2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiff's claim.
>
> 3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at later time shown.

> 6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.
>
> 7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.

Mo. Rev. Stat. § 537.762 (1987) (full text at App. 14a).

STATEMENT OF THE CASE

Robert Carney and Sheila Carney filed their Petition for Damages against BIC Corporation and Clifford Massie d/b/a Massie One Stop in The Circuit Court of the City of St. Louis on July 28, 1994. In that civil action, plaintiffs sought damages for the wrongful death of their two year-old son under theories of strict liability and negligence in connection with the defendant's design, manufacture and sale of butane lighters. BIC Corporation is a New York Corporation with its principal place of business in Connecticut. Clifford Massie is a resident of Missouri, as are respondents Robert and Sheila Carney. Therefore, diversity of citizenship did not exist.

On February 23, 1995, Clifford Massie, d/b/a/ Massie One Stop and respondents Robert and Sheila Carney, entered into a stipulation for interlocutory dismissal in which defendant Massie remained a party for purposes of venue and jurisdiction pursuant to Mo. Rev. Stat. § 537.762 (1987). App. 11a. On March 3,

1995, BIC Corporation removed the civil action to the United States District Court for the Eastern District of Missouri, contending that diversity of citizenship existed and that removal was proper under 28 U.S.C. § 1446. Respondents Robert and Sheila Carney filed their Motion for Remand on March 9, 1995, pursuant to 28 U.S.C. § 1447(c) on the grounds that diversity of citizenship warranting removal did not exist because the dismissal of Clifford Massie d/b/a Massie One Stop was interlocutory, and Massie remained a party for purposes of venue and jurisdiction pursuant to Mo. Rev. Stat. § 537.762. On July 14, 1995, the Honorable Donald J. Stohr, Judge of the United States District Court for the Eastern District of Missouri, entered an order remanding the civil action to the Circuit Court of the City of St. Louis. App. 8a.

BIC Corporation filed its Petition for Mandamus with the United States Court of Appeals for the Eighth Circuit on August 21, 1995. The Petition for Mandamus was denied on November 2, 1995. App. 13a. BIC Corporation filed a Notice of Appeal on August 14, 1995, seeking to overturn the remand order of July 14, 1995. On July 8, 1996, the Eighth Circuit Court of Appeals dismissed BIC's appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction, holding that the remand order was based solely upon the district court's conclusion that removal jurisdiction did not exist and that the district court's consideration of Mo. Rev. Stat. § 537.762 was in no way separate from the jurisdictional determination. App. 6a. The Court of Appeals concluded that the district court made no determinations concerning substantive rights of the parties, that the remand order fell squarely within 28 U.S.C. § 1447(d) and, therefore, was not subject to review on appeal. App. 6a-7a.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that review on a writ of certiorari is not a matter of right, but of judicial discretion, to be granted only for compelling reasons. Section (a) of the Rule indicates that the character of the reasons the court considers includes where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. In this case, appellate review has been, and is being sought of a remand order based solely upon a lack of diversity and subject matter jurisdiction. Remand orders issued under 28 U.S.C. § 1447(c) and invoking the grounds specified therein — that the court lacks subject matter jurisdiction— are immune from review by appeal or otherwise pursuant to 28 U.S.C. § 1447(d). *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975). There is no conflict in the federal courts of appeal over the reviewability of remand orders. Since this Court's decision in *Thermtron*, federal appellate courts, including the Eighth Circuit Court of Appeals, have consistently reviewed remand orders which affect the substantive rights of the parties apart from any jurisdictional decision because those remand orders are based upon grounds outside of 28 U.S.C. § 1447(c). The remand order now under consideration is not based upon a district court's determination that a federal statute is unconstitutional, but rather is based solely upon a lack of diversity and subject matter jurisdiction. The remand order decides no issues that affect the substantive rights of the parties. It is precisely the type of remand order that Congress intended, through the enactment of 28 U.S.C. § 1447(d), to not be reviewable by appeal or otherwise.

Remand always results in a reduction of federal jurisdiction, and every statute or rule of law that precludes removal due to its interlocutory effect would constitute an unconstitutional

attempt to oust federal jurisdiction if BIC's reasoning is followed.

The Missouri statute in question neither increases, nor decreases, federal jurisdiction. If diversity jurisdiction does not exist at the time of filing, the application of Mo. Rev. Stat. § 537.762 does nothing to create diversity. If diversity does exist at the time of filing, the application of Mo. Rev. Stat. § 537.762 does nothing to destroy diversity. The interlocutory effect of dismissal of the retailer under Mo. Rev. Stat. § 537.762 is no different than the effect of various other procedural rules that likewise have been held not to create diversity and removal jurisdiction.

I.

FEDERAL APPELLATE COURTS HAVE CONSISTENTLY HELD THAT REMAND ORDERS BASED UPON THE GROUNDS STATED IN 28 U.S.C. § 1447(c) ARE IMMUNE FROM REVIEW UNDER 28 U.S.C. § 1447(d) AND REMAND ORDERS BASED UPON GROUNDS OUTSIDE OF 28 U.S.C. § 1447(c) ARE SUBJECT TO APPELLATE REVIEW.

Remand orders issued under 28 U.S.C. § 1447(c) are not reviewable by appeal or writ of mandamus. This is true whether or not that order might be deemed erroneous by an appellate court. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976). *In Re Business Men's Assur. Co. of America*, 992 F.2d 181 (8th Cir. 1993). As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject matter jurisdiction— the grounds for remand recognized by 28 U.S.C. § 1447(c)— a court of appeals lacks jurisdiction to entertain an appeal of the remand order under 28 U.S.C. § 1447(d). *Things*

Remembered, Inc., v. Petraca, __ U.S. __, 116 S. Ct. 494 (1995); *Thermtron, supra. See, e.g., Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) (remand order plainly within the bounds of 1447(c) and hence unreviewable by the Court of Appeals, by mandamus or otherwise); *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989) (district court's decision that insurance plan was not subject to ERISA was not apart from the question of subject matter jurisdiction and remand order based upon lack of subject matter jurisdiction was immune from review under 28 U.S.C. § 1447(d)); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1986) (district court expressly based its decision to remand on lack of subject matter jurisdiction, remand order did not affect substantive rights of the parties and state court was free to consider merits of preemption argument); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993) (order remanding wrongful discharge action to state court on ground of lack of jurisdiction was not reviewable; district court's findings were purely jurisdictional, and thus defendants could raise merits of preemption defense in state court); *Bregman v. Alderman*, 955 F.2d 660 (11th Cir. 1992) (where district court indicated that basis of its order to remand was a lack of subject matter jurisdiction, even if erroneous, it was within the bounds of 1447(c) and review was barred by 1447(d)).

Remand orders based on non jurisdictional grounds which are outside the basis specified in 28 U.S.C § 1447(c) are not immune from appellate review. *Thermtron*, 423 U.S. at 345-346, 96 S. Ct. at 590-591; *Hansen, supra* at p. 1387. Thus, appellate review of remand orders has been allowed in the following circumstances, all of which are outside the grounds stated in 1447(c): where review is authorized by another statute, *In Re Resolution Trust Corp.*, 888 F.2d 57, 58-59 (8th Cir. 1989); where there is a substantive ruling of law apart from the jurisdictional

determination that binds the state court, *Pelleport Investors, Inc., v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984); *Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140 (1934); *In Re Life Ins. Co. of North America*, 857 F.2d 1190, 1993 (8th Cir. 1988); where the district court's discretion to remand pendant state claims is involved, *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988); where the court has discretion to remand after dismissal of a party that destroys diversity, *Mangold v. Analytic Services Inc.*, 77 F.3d 1442 (4th Cir. 1996).

But where remand orders are issued under 28 U.S.C. § 1447(c), and they invoke the grounds specified therein, they are immune from review under 28 U.S.C. § 1447(d). *Farm Credit Bank of St. Paul v. Finstrom*, 888 F.2d 559 (8th Cir. 1989); *In Re Shell Oil Co.*, 932 F.2d 1523 (5th Cir. 1991); *National City Bank v. Coopers and Lybrand*, 802 F.2d 990 (8th Cir. 1986).

II.

THE REMAND ORDER AT ISSUE IS BASED SOLELY ON A LACK OF SUBJECT MATTER JURISDICTION RATHER THAN ON A FEDERAL CONSTITUTIONAL ISSUE AND THERE IS NO CONFLICT IN THE CIRCUITS CONCERNING THE REVIEWABILITY OF REMAND ORDERS THAT TURN ON FEDERAL CONSTITUTIONAL ISSUES.

As stated in the district court's remand order of July 14, 1995, (App. 8a), "the propriety of removal turns on the interpretation of subsections 6 and 7 of § 537.762". After stating that it was not persuaded by BIC's contention that the statute was an impermissible attempt by state law to defeat removal jurisdiction, the district court concluded that "the interlocutory nature of the dismissal pursuant to § 537.762 renders the voluntary-involuntary dismissal distinction insignificant in this

context and makes a removal relying on the dismissal improper.". App. 9a.

By so stating, the district court concluded that the retailer, Defendant Clifford Massie, remained a party for purposes of jurisdiction and venue and, therefore, diversity jurisdiction did not exist pursuant to 28 U.S.C. § 1332 that would entitle BIC to removal under 28 U.S.C. § 1441(b). Pursuant to 28 U.S.C. § 1447(c), the district court concluded that it lacked subject matter jurisdiction and remanded the case to the Circuit Court of the City of St. Louis.

At page 8 of the Petition for Writ of Certiorari, petitioner sets out the basis for its argument that there is a conflict in the circuits and substantial uncertainty in the law concerning the reviewability of remand orders that turn on federal constitutional issues. BIC first contends that the Eighth Circuit Court of Appeals "squarely rejected BIC's argument that the district court's remand order was reviewable because the district court gave the Missouri statute a construction that violates the Supremacy Clause." Next, at page 8, BIC argues that "the Eighth Circuit treated BIC's argument as addressing 'the merits' and held that it could not consider the issue because under 28 U.S.C. § 1447(d) it lacked jurisdiction to review the remand order." BIC concludes by stating at page 9 that "The Eighth Circuit thus rejected the constitutional issue exception as a basis for review of remand orders."

Review of the opinion reveals however, that the Eighth Circuit Court of Appeals, rather than rejecting BIC's constitutional argument, simply chose not to address the merits of BIC's argument, leaving BIC free to challenge the constitutionality of Mo. Rev. Stat. § 537.762 in the state court proceedings after remand.

There was no need to invoke what BIC refers to as the "constitutional issue exception" because the basis of the district court's remand order was clearly a lack of diversity and a lack of subject matter jurisdiction. As stated in the Eighth Circuit's Opinion (App. 6a):

> The remand order in the present case does not come within the *Thermtron* exception, because it was based on a ground specified in 28 U.S.C. § 1447(c) — the district court's determination that it lacked subject matter jurisdiction to hear the action. After noting that the stipulated dismissal provided that, in accordance with Mo. Rev. Stat. § 537.762(6), Massie would remain a party in the action for purposes of venue and jurisdiction, **the district court concluded that the dismissal of Massie did not create removal jurisdiction based upon diversity of citizenship and remanded the present case to Missouri state court. Thus, the remand order was based solely upon the district court's conclusion that removal jurisdiction did not exist. Although the district court applied Mo. Rev. Stat. § 537.762(6), in reaching this conclusion, its consideration of § 537.762(6) was in no way separate from the jurisdictional determination. . . . Thus, the remand order falls squarely within 28 U.S.C. § 1447(d) and is foreclosed from appellate review** (emphasis added).

Because the district court remanded solely on the basis of a lack of subject matter jurisdiction under 28 U.S.C. § 1447(c),

appellate review is precluded by 28 U.S.C. § 1447(d), and there was no authority to consider the numerous exceptions cited previously that permit appellate review on grounds outside of 28 U.S.C. § 1447(c).

BIC relies heavily on *In Re TMI Litigation Cases Consolidated II,* 940 F.2d 832 (3d Cir. 1991), to establish the existence of a constitutional issue exception, and a conflict among the circuits due to the Eighth Circuit's failure to apply that exception in this case. However, in *TMI,* the district court's remand order was based upon the court's determination that the Price-Anderson Amendments Act of 1988 was unconstitutional. The reason for the Third Circuit's decision to review the remand order in *TMI* is clearly stated at pages 844-845 of the opinion:

> . . . we cannot conclude that, in the situation presented here, Congress intended that § 1447(d) operate to prevent appellate review of the district court order. We are confident that the jurisdictional determination of the district court, **resting as it did upon the conclusion that the entire statutory scheme authorizing removal was unconstitutional, was not the type of federal subject matter jurisdiction decision intended to be governed by the terms of or the policy underlying § 1447(c) and 1447(d). Section 1447(d) therefore has no application. In order to fall within sections 1447(c) and 1447(d), a remand order must be based upon a finding that removal was not authorized by Congress** (emphasis added).

Also important to the Third Circuit's decision to review in *TMI* was the district court's clearly expressed belief that there

was substantial ground for a difference of opinion concerning the issue of constitutionality, and the fact that the district court certified the question for immediate appeal pursuant to 28 U.S.C. 1292(b). *TMI, supra* at p. 847.

TMI allowed review because the district court, which clearly had both federal question jurisdiction and removal jurisdiction, triggered remand by declaring the Price-Anderson Amendments Act of 1988 unconstitutional, and holding that Congress exceeded its authority by creating a federal forum for public liability actions. At page 835, the *TMI* court recognized that the district court's determination with respect to subject matter jurisdiction rested not on any failure to satisfy the jurisdictional requirements of the Amendments Act, but rather upon the court's conclusion that the Amendments Act itself was unconstitutional, which were grounds clearly outside of 28 U.S.C. § 1447(c). The district court's decision had obvious binding implications in the state court proceedings below if the appellate court refused to review the remand order since the district court clearly had jurisdiction pursuant to the express provisions of the federal statute and its decision could not be considered purely jurisdictional.

In contrast to *TMI*, the remand order now under consideration is not based upon either the district court's or the appellate court's ruling of unconstitutionality, but rather upon a lack of subject matter jurisdiction. The Eighth Circuit's opinion points out that the remand order was based solely upon the district court's conclusion that subject matter jurisdiction was lacking and that the district court's consideration of Mo. Rev. Stat. § 537.762 was in no way separate from the jurisdictional determination. Recognizing that the district court made no determinations concerning the substantive rights of the parities, and pointing out that it did not reach the merits of BIC's challenge to the remand order, the Eighth Circuit held

the remand order not reviewable under 28 U.S.C. § 1447(d), and dismissed BIC's appeal. The result is that the decision of the district court was only jurisdictional, and neither the district court nor the appellate court reached issues on the merits which preclude BIC from raising the issue of constitutionality in the state court proceeding on remand.

The issue of whether a district court's determination in connection with remand involves substantive issues binding on the parties apart from the jurisdictional issue was discussed in *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989). In *Hansen*, at page 1388, the Ninth Circuit Court of Appeals points out that in *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984) which it also decided, it held the District Court's remand order, involving the enforceability of a forum selection clause, reviewable because the District Court "reached a substantive decision on the merits *apart* from any jurisdictional decision. At page 1388, The *Hansen* court then went on to hold that the District Court's remand order, based upon the decision that the insurance plan at issue was not subject to ERISA, was not reviewable on appeal because "the district court's decision that Hansen's plan was not subject to ERISA, rather than being apart from the question of subject matter jurisdiction, was necessary to determine whether such jurisdiction existed."

While the *Hansen* court declined to decide whether a state court would be required to invoke *res judicata* to determinations involved in reaching the district court's decision, that question has been answered by numerous federal courts of appeal. Both the issue of reviewability of remand orders, and the *res judicata* effect of jurisdictional findings was discussed in *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1986). In rejecting appellant's argument that the remand order was reviewable on appeal, the Eleventh Circuit responded as follows at page 1540:

> It is true that, as in *Clorox* and *Pelleport*, the decision underlying the remand order involved a conclusion of substantive law. However, unlike in those cases, here the substantive law decision *related* to the question of jurisdiction; the remand order did not affect the substantive rights of the parties. . . . **In particular, the court did not reach the merits of the preemption argument. The state court may in fact rule that ERISA does not preempt appellee's state law claims and that appellees must proceed, as appellants contend, under subsection 1132(a)(1)(B) of ERISA . . .** (emphasis added).

Findings of a district court made for the purpose of determining federal jurisdiction have no preclusive effect on a state court. *See, e.g., Soley v. First National Bank of Commerce,* 923 F.2d 406 (5th Cir. 1991) (district court's finding that plaintiff's claims were not within the boundaries of ERISA was a jurisdictional finding that could be reviewed by state court); *In Re Business Men's Assur. Co. of America,* 992 F.2d 181 (8th Cir. 1993) (where district court declined to rule whether ERISA would control remanded action, remand order not reviewable under 28 U.S.C. § 1447(d) where based on lack of federal question jurisdiction); *Baldridge v. Kentucky-Ohio Trans., Inc.*, 983 F.2d 1341 (6th Cir. 1993) (district court's findings purely jurisdictional and defendants not precluded from raising merits of preemption defense in state court); *Nutter v. Monongahela Power Co.*, 4 F.3d 319 (4th Cir. 1993) (district court's jurisdictional findings regarding federal preemption in order remanding workers' compensation retaliation claim to state court would have no preclusive effect in state court).

In many respects this case turns on issues similar to those involved in *Linton v. Airbus Industrie,* 30 F.3d 592 (5th Cir. 1994). In *Linton*, following removal on grounds of both diversity of citizenship and federal question jurisdiction, stipulations were entered into that had the effect of recognizing one of the plaintiffs to be a "stateless" person, thereby destroying diversity. Also, a previous ruling by the district court had rejected the Federal Sovereign Immunities Act (FSIA) as a basis for federal question jurisdiction. Even though the stipulations regarding citizenship had been entered into post-removal, and the district court wrongly concluded that the post-removal events destroyed diversity, the remand order was held not reviewable pursuant to 28 U.S.C. § 1447(d) because it was based upon lack of subject matter jurisdiction. At footnote 38 at page 599 of the *Linton* decision, the court recognized that it did not matter whether the stipulation was considered pre-removal or post-removal, the fact remained that the remand was based upon lack of diversity and subject matter jurisdiction and was not reviewable.

Another important aspect of *Linton* is the appellate court's conclusion, stated at page 598, that the district court's finding that FSIA was inapplicable to the defendants (which destroyed federal question jurisdiction) was a jurisdictional finding that had no preclusive effect and could be freely reviewed by the state court upon remand, relying upon *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S. Ct. 6, 79 L. Ed 244 (1934). The only consequence of the district court's ruling was that the defendants "must have the merits of their FSIA claims determined by a state court rather than by a federal court." *Linton, supra* at 598.

The importance of what preclusive effect the district court ruling will have on the state court upon remand has been a common theme in the cases cited above. While in *In Re Life Ins. Co. of North America*, 857 F.2d 1190, 1993 (8th Cir. 1988)

the Eighth Circuit held a remand order reviewable under a preemption analysis, *Baldridge v. Kentucky-Ohio Trans., Inc.*, 983 F.2d 1341 (6th Cir. 1993) at page 1347 points out the fact that *In Re Life Ins. Co. of North America* was decided before recognition of the difference between complete preemption and the preemption defense. In *In Re Business Men's Assur. Co. of America*, 992 F.2d 181 (8th Cir. 1993), a case decided after *In Re Life Ins. Co. of North America, supra,* the Eighth Circuit followed the preemption analysis of *Hansen, Glasser, Baldridge, Soley,* and *Linton* by denying review of a remand order where the district court concluded it did not have federal question jurisdiction, and where the district court declined to rule whether ERISA would control the remanded action, thus leaving that decision to the state court. Even though the district court considered whether the insurance plan in question was an ERISA plan, the issue was considered only in the context of determining the issue of federal question jurisdiction, and the state court was free to decide the issue on remand.

In this case, the only effect of the district court's ruling, as well as that of the Eighth Circuit Court of Appeals, is the fact that the case is to be tried, and BIC's constitutional arguments considered in state court.

III.

THE INTERLOCUTORY EFFECT OF MO. REV. STAT. § 537.762 DOES NOT RESULT IN AN IMPERMISSIBLE DESTRUCTION OF FEDERAL REMOVAL JURISDICTION.

In truth, it is the interlocutory nature of dismissal under Mo. Rev. Stat. § 537.762 that BIC really complains of. Because the dismissal was interlocutory, it did not constitute a voluntary act which resulted in a final dismissal of a non-diverse defendant

so as to give rise to removal jurisdiction. *Machinsky v. Johnson & Johnson Medical Inc.*, 868 F. Supp. 269 (E.D. Mo. 1994); *Saylor v. General Motors Corp.*, 416 F. Supp 1173 (E.D. Ky. 1976). In *Machinsky*, an interlocutory dismissal without prejudice granted by the court to a retailer under the Mo. Rev. Stat. § 537.762 (the statute now under consideration) was held not to result in a final dismissal of the non-diverse defendant so as to permit removal even though the plaintiff did not oppose the motion to dismiss and suggested language to be used in the order of dismissal.

Under the "voluntary-involuntary rule" adopted by the Eighth Circuit, a case that is nonremovable on its initial pleadings for lack of diversity can only become removable by the plaintiff's voluntary act that definitely and clearly indicates his intention to abandon or discontinue the action as to the non-diverse defendants. *In Re Iowa Mfg. Co.*, 747 F.2d 462 (8th Cir. 1984); *Power v. Norfolk Ry. Co.*, 778 F.2d 468 (E.D. Mo. 1991). The rationale of the voluntary-involuntary test is the prevention of premature removals in cases where the issue of the resident defendant's dismissal has not been fully determined in the state court. *Machinsky, supra* at p. 270; *Saylor v. General Motors Corp.*, 416 F. Supp. 1173 (E.D. Ky. 1976).

Because of their interlocutory nature, numerous other procedural activities have been held not to constitute dismissal of a non-diverse defendant so as to give rise to diversity and removal jurisdiction *See, e.g., Thrapp v. Armstrong World Industries, Inc.*, 767 F. Supp. 822 (N.D. Tex. 1991) ("high-low" settlement between plaintiff and non diverse defendant was not an abandonment of action against non diverse defendant such that action could thereafter be removed on grounds of diversity); *Pulse One Com. v. Bell Atlantic Mobile Systems*, 760 F. Supp. 82 (D. Md. 1991) (summary judgment order removing non diverse individual plaintiffs was interlocutory and not

sufficiently final to warrant removal); *Doe v. Cutter Biological,* 774 F. Supp. 1001 (E.D. La. 1991) (even though non diverse defendants not served, case can nevertheless lack complete diversity and cannot be removed); *Aydell v. Sterns,* 677 F. Supp. 877 (M.D. La. 1988) (plaintiff's instruction in petition to withhold service as to non diverse defendants was not a clear and definite expression to terminate action against them so as to warrant removal); *Higgins v. Pittsburgh-Des Moines Co.*, 635 F. Supp. 1182 (S.D Tex. 1986) (non diverse defendant who was involved in partial settlement remained interested party in case and his liability needed to be submitted to jury, thus partial settlement was not a final dismissal).

BIC has also contended that respondents may not be allowed to "stipulate away" federal jurisdiction. Yet, federal courts have held that as long as they occur before removal, amendments and stipulations limiting the jurisdictional amount in controversy can be effective to prevent removal. *St. Paul Mercury Indemnity Co., v. Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938); *Matter of Shell Oil Co.*, 970 F.2d 355 (7th Cir. 1992); *Woods v. Massachusetts Protective Ass'n,* 34 F.2d 501 (E.D. Ky. 1929).

The point is that the statute now under consideration is no more impermissibly destructive of federal removal jurisdiction than the other procedural activities referred to above. The statute was enacted with a clear purpose in mind. It allows retailers whose only source of liability is having placed the product in the stream of commerce to avoid potentially expensive litigation while at the same time protecting innocent plaintiffs against the possibility of insolvency of designers and manufacturers who are the primary defendants. The retailers remain a party for purposes of venue and jurisdiction and the dismissal is interlocutory, subject to being set aside for good cause at any time until final disposition. App.15a.

CONCLUSION

For the reasons previously stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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